IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. APELU TAMAU, Appellant	No. 37500-1-II UNPUBLISHED OPINION

Bridgewater, J. — Apelu Tamau appeals his Pierce County convictions of two counts of third degree assault and one count of tampering with a witness. Through counsel, Tamau challenges the assault convictions, contending that there was an insufficient factual basis to support his guilty pleas to two counts. In his statement of additional grounds for review (SAG), Tamau challenges his tampering conviction, contending that the prosecutor's testimony supplying the factual basis for that crime was fraudulent, and defense counsel failed to provide effective assistance when he did not object to the testimony. We affirm.

FACTS

The State originally charged Tamau with one count of second degree assault and one

count of violating a protection order, based on an incident that occurred on November 23, 2004. According to the police report, he punched his former girlfriend, Samantha Kee, several times in the face, breaking two teeth and causing her nose to bleed. At the time, a protection order prohibited any contact with Kee.

Tamau was "on warrant status" for several years thereafter. RP at 3. After he was arrested, he learned that the second degree assault was a "Most Serious Offense" and would constitute his third strike, resulting in a sentence of life in prison without possibility of parole under RCW 9.94A.570. CP at 4 (bold typeface omitted). A short time later, he made a series of calls to a friend of his and Kee's. According to the prosecutor, he asked for her help in getting Kee to change her story. He also made at least two phone calls to Kee.

Ultimately, in order to avoid a life sentence, Tamau agreed to plead guilty to two counts of third degree assault and one count of witness tampering, and he stipulated to an exceptional sentence of 15 years, 60 months for each of the three charges.[1] The deputy prosecutor acknowledged that there were no "two separate and distinct acts of assault" in this case, but explained that under *In re Personal Restraint of Barr*, 102 Wn.2d 265-71, 684 P.2d 712 (1984), the parties were agreeing that Tamau was guilty of two counts of third degree assault, and that they were not the same criminal conduct. RP at 9. Tamau assured the court that he had reviewed the charges with his attorney, had no questions, and agreed to the exceptional sentence.

The court accepted the guilty plea and imposed the recommended sentence. Three weeks later, Tamau moved to withdraw his guilty plea, asserting that he had been misinformed about the

[1] Each of the crimes to which Tamau pleaded guilty is a class C felony. Thus no individual sentence could be longer than five years. RCW 9A.20.021; RCW 9A.36.031; RCW 9A.72.120.

sentence, and an exceptional sentence was not warranted. The court denied his motion, and this appeal followed.

ANALYSIS

Tamau contends that because there was a factual basis for only one count of second degree assault, he could not validly plead guilty to two counts of a lesser degree. It is longstanding law that a plea is not invalid simply because an accused chooses to plead to a related lesser offense for which there is no factual basis, in order to avoid conviction of a greater offense. *State v. Zhao*, 157 Wn.2d 188, 200, 137 P.3d 835 (2006); *In re Barr*, 102 Wn.2d at 269-70. There is no reason why that rule should not apply when a defendant pleads to more than one lesser offense, in lieu of the greater offense. *See Zhao*, 157 Wn.2d at 190-91, in which the defendant entered valid guilty pleas to three crimes where there were only two incidents alleged and two original charges.[2]

If the decision to plead guilty is based on the defendant's informed review of all of his alternatives, it is voluntary, and he is bound by it. *See North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970). Informed review requires that the defendant have adequate notice and understanding of the elements of the charges against him. *See Zhao*, 157 Wn.2d at 200. There must, therefore, be a factual basis to support the original charge, and the defendant must understand the relationship of his conduct to that charge. *In re Barr*, 102 Wn.2d at 270. He must also understand the infirmity in the amended charges. *See Zhao*, 157 Wn.2d at 199 (citing *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 721, 10 P.3d 380 (2000)).

Those requirements were all satisfied here. The trial court found that there was a factual basis for the original charge, and Tamau does not challenge that determination. The prosecutor

[2] The defendant had been charged with two counts of first degree child molestation, and he pleaded guilty to two counts of conspiracy to commit indecent liberties and one count of second degree assault.

explained that the lesser assault charges were both based on the same conduct, and there was not a factual basis for the second charge, but the parties were agreeing that Tamau was guilty of two assaults. Defense counsel confirmed that, explaining that the agreement was based on Tamau's desire to avoid a third strike. Tamau concurred. It is absolutely clear from the record that he made an informed choice.

Tamau, pro se, challenges as "fraudulent" the testimony provided by the prosecutor to establish a factual basis for the tampering charge. SAG at 17-19. He waived that claim when he pleaded guilty. *See In re Pers. Restraint of Bybee*, 142 Wn. App. 260, 267-68, 175 P.3d 589 (2007) (a guilty plea waives the right to challenge the sufficiency of the evidence); and *State v. Hystad*, 36 Wn. App. 42, 46, 671 P.2d 793 (1983) (by pleading guilty, a defendant chooses not to defend himself and waives the right to testify or confront his accusers).

Tamau also contends that his attorney failed to provide effective assistance because he did not object to the prosecutor's statements. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, and the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In the plea bargaining context, Tamau must show that but for the claimed error, he would not have pleaded guilty. *See State v. Jamison*, 105 Wn. App. 572, 590, 20 P.3d 1010, *review denied*, 144 Wn.2d 1018 (2001).

Tamau makes no such showing. Defense counsel told the court that the plea agreement was the best deal they could make with the prosecutor, and they agreed to it in order to avoid the possibility of a life sentence. Tamau was in the best position to know whether the prosecutor spoke the truth, and he chose to plead guilty in order to obtain the benefit he had bargained for.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Quinn-Brintnall, J.

Van Deren, C.J.